In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 201

DAVID HYUN, PETITIONER

v.

HERMAN R. LANDON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 45–53) is reported at 219 F. 2d 404.

JURISDICTION

The judgment of the Court of Appeals was entered on January 31, 1955 (R. 53). Rehearing was denied on April 7, 1955 (R. 53–54). The petition for a writ of certiorari was filed on July 1, 1955, and granted on October 10, 1955 (R. 54). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether in the circumstances of this case it was an abridgment of procedural due process to admit into evidence, in a deportation proceeding in Los Angeles, testimony of witnesses taken by deposition in Honolulu.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the ac-

cusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

8 C. F. R. [1951 Supp.] 151.2 (a), 15 F. R. 7637, provided:

> *Conduct of hearing*—(a) *Hearing Officer; general powers.* The officer assigned to conduct the hearing under a warrant of arrest shall be referred to as the "hearing officer." He shall have authority to (1) administer oaths and affirmations, (2) issue, during the course of the hearing, any subpenas authorized by law, (3) conduct the hearing and rule upon all objections to the introduction of evidence or motions made during the course of the hearing, (4) take or cause depositions to be taken, (5) make decisions in accordance with § 151.5, (6) grant voluntary departure or preexamination pursuant to § 150.3 of this chapter, or both, and (7) take any other action consistent with applicable provisions of law and regulation.

STATEMENT

This habeas corpus proceeding arose as a challenge to a deportation order (R. 59–62), based on petitioner's membership in the Communist Party, which was affirmed by the Board of Immigration Appeals (R. 56–58). The District Court for the Southern District of California denied the peti-

tion for the writ (R. 37–38), and its action was affirmed on appeal (R. 53).

Petitioner, a native of Korea, was admitted to the United States at Honolulu, Territory of Hawaii, on May 26, 1924 (R. 112, 206, 228B, Ex. 4). He was subsequently admitted to the continental United States at Los Angeles, California, on September 1, 1947, carrying a passport indicating his birthdate as January 3, 1917, and his birthplace as Kirin, Manchuria (R. 109, 110, 205–206, 228, 228A, Ex. 2, 3).

The deportation proceedings against petitioner were commenced by the issuance of a warrant of arrest on October 31, 1950, charging him with being unlawfully within the United States and subject to deportation under the provisions of the Act of October 16, 1918, as amended, for the reason that he was found to have been a member of the Communist Party of the United States after entry. He was served with the warrant and arrested that same day, after being informed as to the cause of arrest, the conditions of release, and his right to counsel. (R. 227–228.) On November 3, 1950, petitioner's counsel, Milton S. Tyre, who had entered an appearance in the case over a year before,[1] filed a petition in the United States District Court for the Southern District of California seeking petitioner's release on administrative bail. The writ of habeas corpus was ultimately

[1] Mr. Tyre had represented petitioner since August 9, 1949, when he was arrested under a prior warrant (R. 104, 202).

discharged on January 22, 1951. *Hyun* v. *Landon*, No. 35, O. T. 1951, R. 140–143. See also: R. 100, 105.[2]

On November 22, 1950, the deportation hearing was commenced in Los Angeles, California. Petitioner was called as a witness and was sworn (R. 99–100). After he admitted his identity and that the warrant had been served on him (R. 100), the hearing officer explained the charges against him and the purpose of the hearing (R. 100–102). His counsel, Mr. Tyre, then moved for a continuance for "a couple of weeks" to prepare a defense, explaining that pressure of other business, including the habeas corpus appeal, had prevented proper preparation of the case. The hearing officer denied this motion on the grounds that the petitioner would have to be continued in custody pending determination of deportability, and the government had as yet produced no evidence which would warrant a continuance to procure countervailing evidence. (R. 103–106.) Petitioner was then questioned further but refused to answer all questions, including one as to his full name, on the asserted basis that he was unprepared (R. 107–112). On being questioned concerning pres-

[2] The subsequent history of this proceeding is more fully set forth in the opinion in *Carlson et al.* v. *Landon*, 342 U. S. 524, in which this Court sustained petitioner's detention without bail pending the deportation proceedings. See also the opinions of the United States Court of Appeals for the Ninth Circuit in *Carlson* v. *Landon*, 186 F. 2d 183, 187 F. 2d 991, and *Hyun* v. *Landon*, 186 F. 2d 190.

ent and past membership in the Communist Party, petitioner refused to answer on the same ground and on the further ground that the answers called for were incriminating (R. 112–114).

The examining officer thereupon made a motion to take the depositions in Honolulu, Hawaii, of four named persons (R. 114). Counsel for petitioner objected to the motion on the grounds (1) that he had had insufficient time to prepare the case for hearing and (2) that the proceeding was in violation of law because the warrant of arrest had been improperly served (R. 115). Counsel was given the opportunity to expand his objections in a written brief (which he failed to do) (R. 115–116). The hearing officer then made the following ruling (R. 117–118):

> It is deemed that counsel has no documentary evidence to present at this time that has a bearing on the issue in the case. The motion of the Examining Officer to take depositions from the named persons in Honolulu, Territory of Hawaii, at some future date, is granted.
>
> Counsel will be given notice of the date those witnesses will appear at the Office of the United States Immigration and Naturalization Service in Honolulu, T. H., and at that time, the respondent may be represented there by counsel, and may present witnesses, and counsel may submit interrogatories, which will be propounded if he so desires on the dates the named witnesses appear in Honolulu.

When counsel objected that the motion did not explain the matter to be obtained by deposition, or why the depositions were being taken in Hawaii, the examining officer said (R. 118–119):

> I will say for the record that the persons I mentioned are residents in the Territory of Hawaii, and for that reason the motion was made, and it is expected that the testimony will elicit facts relating to the respondent's membership in the Communist Party of the United States as charged in the warrant of arrest.

Petitioner's counsel was again given an opportunity to enlarge on his exceptions in a brief (R. 119). The hearing was then adjourned, to be resumed at a future date on notice to counsel (R. 119). At no time during this hearing did petitioner request that he be allowed to go to Honolulu for the deposition taking. At no time did he state that he was financially unable to retain counsel in Honolulu, or to send his California counsel to Hawaii.[3]

On December 7, 1950, petitioner was sent a notice of the taking of depositions, which informed him in pertinent part as follows (R. 266–267):

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[3] In a prior proceeding, the Service made a motion to hold the hearings in Honolulu, Hawaii. Petitioner, through his counsel in the instant hearing, vigorously objected to this, and the plan was apparently abandoned in response to such objections. See the record in *Hyun* v. *Landon*, No. 35, O. T. 1951, pp. 115–116.

> Pursuant to the order of Hearing Officer John B. Bartos on November 22, 1950, in your case, depositions will be taken from the following-named persons on December 18th and 19th, 1950, at the Immigration Station, Honolulu, T. H.:
>
> Richard C. Kageyama, Easter J. Doyle, Donald Uesugi, Ichiro Izuka.
>
> Your counsel may appear personally or through associate counsel during the taking of these depositions, or you may submit interrogatories. If interrogatories are submitted, they should arrive in this office not later than 9:00 A. M., December 18, 1950.

Petitioner failed to respond to this notice in any way, or to make any objection beyond that which his counsel had already stated at the hearing.

On December 18, 1950, the deposition proceedings were convened before a hearing officer of the Service at the Immigration and Naturalization Station, Honolulu, Hawaii (R. 229). The four witnesses mentioned in the notice appeared at the time and place specified pursuant to administrative subpoenas served on December 8, 1950 (R. 231, 233, 259, 260). One of the witnesses, Richard M. Kageyama, brought his attorney with him (R. 230, 231). At the beginning of the proceeding, the following colloquy took place between the hearing officer and the examining officer (R. 229-230):

> By HEARING OFFICER. This proceeding is for the purpose of taking depositions in

the case of David Hyun as ordered by the Hearing Officer at Los Angeles, California, on November 22, 1950. Has the Examining Officer served notice upon the Respondent and his Counsel regarding these depositions?

By EXAMINING OFFICER. That is correct. I can offer a notice of appearances, a notice of the date and place specified for the taking of these depositions, dated December 7, 1950, which were sent registered mail to Milton S. Tyre, the attorney for the Respondent, and the Respondent. And further, I have been advised by attorney Symonds of the firm of Bouslog and Symonds that he has been in communication with Mr. Tyre and had originally intended to enter an appearance here. However, I have just been advised by Mr. Symonds that he does not desire to enter an appearance, nor does he desire to cross-examine the deponents today. I will offer you copies of the communications addressed to both Tyre and to David Hyun.

* * * * *

Before testifying, each of the four witnesses was sworn and was informed by the hearing officer of the penalty imposed in case of perjury (R. 230, 233, 241–242, 259). The questioning was then conducted by the examining officer.

Two of the witnesses whose depositions were taken had been officers in the Communist Party in Hawaii during the time they stated they knew petitioner (R. 235, 253). They each testified that

they had seen him in attendance at several closed Communist meetings. The witness Izuka, who was trained at a Communist training school in San Francisco (R. 251–252) and was a Communist from 1938 to 1946, testified in detail as to the organization of the Communist Party in Hawaii (R. 252–253). Izuka specifically placed petitioner at three meetings of the executive board of the Communist Party in Hawaii (R. 245, 246–248) and recalled conversations he had had with him on Communist matters at two of the meetings (R. 248). He recalled also a dispute within the Communist Party over the firing of a party worker in which petitioner engaged (R. 250–251). Izuka stated that he knew petitioner socially (R. 250) and as a member of the executive board of the Communist Party in Hawaii (R. 256).

On January 15, 1951, the transcribed depositions were received in the Los Angeles office of the Immigration and Naturalization Service, and on January 22, 1951, a copy of the transcript was sent by registered mail to petitioner's counsel with instructions to submit cross interrogatories if he had any within 10 days. When none were received, the Service examining officer made repeated efforts to reach petitioner's counsel by telephone, leaving word each time that he inform the Service as to his intentions. Petitioner's counsel failed to respond to any of these messages. (R. 125.)

On March 13, 1951, the deportation hearing was reconvened and the depositions were marked for identification. Petitioner's counsel again moved for a continuance in order that petitioner might be allowed to study the depositions and determine whether he would submit cross interrogatories and, if so, what interrogatories. The hearing officer granted this motion despite the fact that petitioner's counsel had had a copy of the depositions for almost two months. Petitioner was allowed 10 business days to assemble his cross interrogatories. The new hearing date was set for March 28 and 29, 1951. (R. 120–124.)

On March 28, 1951, the hearing was again resumed (R. 124). The depositions were offered in evidence and counsel for petitioner was allowed to state his objections for the record. The gist of his argument was that the Service should have provided funds to send both petitioner and his counsel to Hawaii to confront the deposition witnesses and cross-examine them: that both the proceeding and the statute under which it was being conducted were unconstitutional; and that he was being illegally restrained of his liberty. (R. 128–130.) The hearing officer then made the following rule (R. 130–131):

> You have made an over-all objection to the depositions and you have made two over-all objections to the proceedings. We will take your first three objections up at this time.

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In deportation proceedings the government does not have the burden of sending the respondent or his counsel to the place where the depositions are taken. Therefore, your objection on that ground is overruled.

As to the constitutionality of the McCarran Act, that is not for me to determine. It was passed by the Congress of the United States. The charge in the warrant of arrest in this case is within that Act. The constitutionality of the Act is for the courts to determine, not me. Counsel's objection on that ground is overruled.

As to the matter of the detention of the respondent that is not within my province to release him or detain him. The Attorney General ordered him detained. Counsel has petitioned for a writ of habeas corpus because of the detention of the respondent. The petition was dismissed in the United States District Court. The ruling of the District Court was affirmed by the United States Circuit Court of Appeals for the Ninth District. Counsel's objections on those grounds are overruled.

Counsel were there any other objections interposed in there on those general grounds that I perhaps have missed?

COUNSEL. No.

Petitioner's counsel denied that any attorney had been retained for his client in Hawaii. While he admitted receiving advance notice of

the deposition proceedings there, he contended that it was essential that either he or petitioner be present in Hawaii to conduct the cross examination. The following colloquy took place between the hearing officer and petitioner's counsel (R. 132):

> HEARING OFFICER. Just one moment, Mr. Tyre, I see here and I know that Mr. Hyun was not represented by counsel out there. However, I do not make any agreement with your statement that it was impossible that he be represented there at the time the depositions were taken.
>
> COUNSEL. Well, by impossible I don't mean it was physically out of reach. I mean that it was impractical for David Hyun to be represented in Honolulu by another lawyer to cross examine witnesses without the presence of Mr. Hyun to assist in such cross examination, or at least without the presence of his own counsel, which I think in itself would have been inadequate. I am not asking the Hearing Officer to agree or disagree. That is merely a statement by me so that there will be no question on the record as to his representation in Honolulu.
>
> HEARING OFFICER. There is no question in my mind he was not represented there but there is also no question in my mind but that he could have been represented there.

The examining officer noted that petitioner could have been present under guard at the deposition proceedings had he made any request for such an opportunity (R. 132–133).

Counsel for petitioner stated that it was impossible to employ written cross-interrogatories to question the witnesses in Honolulu under the circumstances, and that he would submit none (R. 200).

Petitioner was then recalled to the stand by the examining officer to answer questions which he had previously contended he was unprepared to answer (R. 201–202). He gave his full name and stated his belief that he had been born in Seoul, Korea, on January 3, 1917 (R. 202–203). He also said that he thought himself to be a citizen of China, as his passport indicated (R. 205–206). Petitioner refused to answer a series of questions as to membership in the Communist Party of the United States, claiming fear of possible incrimination and violation of his First Amendment rights (R. 208–210). He likewise refused to state whether he knew each of the four government witnesses whose testimony was taken by deposition, on the same grounds (R. 210–211). Counsel for petitioner then moved for a further continuance to prepare a defense, and the following exchange took place between him and the hearing officer (R. 212–213):

> HEARING OFFICER. Have you any statement as to what you intend to introduce?

I don't mean you have to name your witnesses or disclose what evidence but I would like to have some idea as to your intentions.

COUNSEL. I intend to correspond with Honolulu in the first place for the purpose of ascertaining what evidence is available if any for the purpose of putting on the defense and this will take some time obviously since it all has to be done by correspondence, and I am also contemplating putting on some local evidence to controvert the import, if not some of the specific statements made by the witnesses in depositions introduced as Exhibit 5.

HEARING OFFICER. Do you contemplate having witnesses appear in Honolulu as well as on the mainland?

COUNSEL. That I cannot tell until I communicate with Honolulu; I don't know; I have never been there and heretofore I haven't been in correspondence with them concerning evidence.

* * * * *

HEARING OFFICER. Then you believe that there are witnesses there Mr. Tyre?

COUNSEL. I have stated that I have to communicate with Honolulu for the purpose of determining whether this evidence will be available as I have already stated on the record.

HEARING OFFICER. Then if the evidence is available in Honolulu do you contemplate that the evidence will be given in

> Honolulu? That is one thing I am *trying determine* [*sic*].
>
> COUNSEL. I would presume so. It is a little hypothetical at this time.

The hearing officer then continued the hearing to April 19, 1951, in order that petitioner's counsel might ascertain and state what evidence he wished to present (R. 213).

On April 19, 1951, the hearing was again convened. Petitioner's counsel stated that he had been in contact with Honolulu, and reiterated that he could not cross examine the government witnesses unless petitioner could either be sent there or the witnesses brought to Los Angeles. He again made a motion to this effect which was denied. (R. 216.) A motion to strike the depositions was likewise denied (R. 220). During argument on petitioner's motion, the examining officer made the following observation (R. 217):

> The government does not feel under any obligation to transport witnesses at great expense over thousands of miles. The taking of depositions is a recognized and accepted and acknowledged form of taking testimony under such conditions.
>
> At the time the depositions were taken in Honolulu counsel and respondent were notified as to the date the depositions would be taken. They could have been present if they so desired, and even though Mr. Hyun is in custody if he had indicated a

> willingness to be present arrangements would have been made to have him go to Honolulu under proper escort. However, that would have had to be under his own expense if he wanted to be present. That was up to him and that was up to counsel. They did not see fit to avail themselves of that and counsel in the alternative was given an opportunity to prepare cross interrogatories. He too declined to do this.

Petitioner's counsel then suggested that he be given a week or 10 days to find a witness who might be able to testify as to the character of the Communist Party of the United States. That motion was denied after argument as to the relevancy of such testimony. (R. 221–226.)

On April 24, 1951, the hearing officer rendered his decision, finding that petitioner (1) was an alien, a native of Korea and a citizen of China; (2) that he had entered the United States at Honolulu, Hawaii, on May 26, 1924, and was admitted for permanent residence; and (3) that he was a member of the Communist Party of the United States in Honolulu, Territory of Hawaii, during 1945 and 1946. The hearing officer rejected as not relevant two of the four depositions taken in Hawaii, but based his finding as to Communist Party membership on the depositions of Donald T. Uesugi and Ichiro Izuka, whose testimony he summarized. He recommended deportation under the charge stated in the warrant of arrest. (R. 94–98.)

On the same day, petitioner filed his written exceptions to the hearing officer's recommended adverse decision, alleging as error, *inter alia,* the failure of the hearing officer to provide transportation for petitioner and his counsel to attend the deposition proceedings in Honolulu (R. 65, 66). Petitioner also filed a motion to reopen the record and offer of proof (R. 68–69), alleging that he could, if the record were reopened, show through the testimony of Gus Hall, National Secretary of the Communist Party, or another witness, the true nature of the Communist Party of the United States, which organization was then the subject of an administrative proceeding before the Subversive Activities Control Board to compel it to register as a Communist action organization as defined in the Internal Security Act of 1950. In support of his motion, petitioner appended a copy of the amended answer of the Communist Party in that litigation (R. 70–92) and an affidavit of the National Secretary of the Communist Party, who swore on information and belief to the accuracy of the allegations set forth in the amended answer (R. 93). On April 25, 1951, this motion was denied on the ground that the character of the Communist Party was not in issue in the deportation proceeding (R. 67–68).

On August 1, 1951, an Assistant Commissioner issued an order of deportation which adopted the recommended order of the hearing officer

(R. 59–62). This order disposes of the objection to the deposition testimony as follows (R. 61):

> Counsel next protests that the hearing officer permitted depositions to be taken in Hawaii, without providing transportation to that place for the respondent or counsel. The law requires no such provision.

The Assistant Commissioner found that the evidence of petitioner's membership in the Communist Party of the United States during 1945 and 1946 was substantial and reliable and fully sustained this ground for deportation.

On March 12, 1952, petitioner's appeal before the Board of Immigration Appeals came on for hearing. Petitioner's counsel told the Board that, while his client had been told that he might have gone to the deposition hearings in Honolulu had he defrayed the expenses of both himself and two guards, "[o]bviously he had not the money to do that, or to hire an attorney in Honolulu" (R. 63). When asked what his specific application was, he replied (R. 64), "[m]y application is that the case be sent back for a hearing so as to produce competent testimony, not by deposition." In dismissing the appeal on December 1, 1952 (R. 56–58), the Board of Immigration Appeals made the following ruling relative to the deposition procedures (R. 58):

> Concerning the request of counsel for rehearing in the case to receive testimony

of witnesses to supplement the evidence in the nature of depositions or sworn statements taken about December 18, 1950 in Honolulu, Hawaii in order that counsel may cross-examine such witnesses, it is noted that appropriate notice was given to counsel for the respondent on December 7, 1950, apprizing him that such statements or depositions would be taken and giving the respondent an opportunity to be present in person or through counsel and cross-examine the deponent. It appears that an appearance was waived by counsel for the alien (Ex. 5). Counsel now contends that the alien is not financially able to send a representative to Honolulu to appear for him, and was not able to do so in November or December of 1950. There is no provision of law or regulations which requires that the United States Government provide transportation for an alien or counsel to the place of hearing in a situation such as in this case where the respondent resides in the State of California and depositions were taken in Hawaii. * * *

SUMMARY OF ARGUMENT

I

During the deportation hearings, extended repeatedly for postponements petitioner was granted to formulate defenses which never materialized, he had ample opportunity for cross-examination of the deponents who testified against him. At the first of four hearings which pre-

ceded the order of deportation, when the examining officer moved to take depositions, petitioner's counsel objected on the broad ground that the government had not made arrangements to transport petitioner and his counsel to Honolulu. He did not contend that petitioner was unable to have counsel present at the deposition taking to cross-examine the witnesses, nor did he suggest any special reason why it was necessary that petitioner confront the witnesses to be questioned. The record indicates that, after petitioner had been given due notice of the time and place of the deposition taking, he had been in communication with Honolulu counsel but that the decision had been made not to have counsel enter an appearance for him there.

Subsequent to the taking of the depositions, petitioner objected to their introduction in the administrative proceeding, not because he could not have had the deponents questioned by counsel of his choice or because he had been unable to attend himself, but rather on the ground that, as in a criminal trial, no testimony taken outside of his presence could be used in a deportation proceeding, regardless of his failure to articulate some timely and specific objection to such procedure or to move for some modification of the deposition order. That remains the gist of his argument.

The record shows, however, that the decision of the hearing officer to commission the taking of

depositions to procure the testimony of the witnesses in Hawaii was eminently reasonable. He might well have assumed from the nature of the issues involved that such witnesses would not appear voluntarily, but would have to be subpoenaed to testify. The question of whether an administrative subpoena could be used to compel such witnesses to travel thousands of miles poses both legal and practical problems. Even assuming the power, such procedure, frequently involving resort to auxiliary court enforcement proceedings, would have been time-consuming at the very least, and would have extended the period during which petitioner was being held without bail. Petitioner had vigorously opposed having hearings under a previous warrant transferred to Hawaii, a fact which might well have been known to the hearing officer and entered into his choice of the deposition procedure.

After the depositions were taken, petitioner was given abundant opportunity to submit written interrogatories, but following extended consideration he rejected this method of cross-examination. Then, he was given further opportunity to secure any testimony he might have either in Hawaii or elsewhere. While the record indicates that he again canvassed the possibility through his counsel, he failed to have the government witnessess cross-examined and failed to produce any evidence material to his case either then or at any other time during the two-year proceeding. His only

effort to meet the case against him on its merits was an offer to prove that the Communist Party was not of the character that Congress deemed it to be—an offer of proof that was quite properly rejected. This record suggests that petitioner's failure to defend the warrant charges was not occasioned by the use of unfair procedures, but by the fact that he had no defense to present.

II

Petitioner's thesis is that the admittedly grave character of deportation proceedings requires that the Sixth Amendment guaranty of confrontation, available to an accused in a criminal proceeding, be applied by analogy to forbid the use of depositions. This Court has consistently held, however, that deportation proceedings are not controlled by procedural requirements appropriate to a criminal trial. See, *e. g., Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594–595; *Carlson* v. *Landon*, 342 U. S. 524, 537–538; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275.

In *United States* v. *Zucker*, 161 U. S. 475, the Court held that the Sixth Amendment guaranty of confrontation "relates to a prosecution of an accused person which is technically criminal in its nature", and sustained the government's use of depositions taken abroad in a customs forfeiture case over the objection of the defendants that such action, though civil in form, was in substance a criminal case. The two circuits

which have considered the precise issue involved in this case have held against petitioner's contention that deposition testimony is necessarily inadmissible in a deportation proceeding. *Singh* v. *District Director,* 96 F. 2d 969 (C. A. 9); *Berkman* v. *Tillinghast*, 58 F. 2d 621 (C. A. 1).

The state insanity and asexualization cases cited by petitioner to demonstrate that confrontation is an essential of due process of law, where personal rights are involved, are inapposite. Those cases, arising under special legislation, involve problems of state court supervision of defectives who are incapable of managing their own affairs.

The test of due process in a deportation hearing is, not whether a particular mode of procedure is followed, but whether the hearing is fairly conducted in a manner appropriate to the administrative remedy sought. *The Japanese Immigrant Case*, 189 U. S. 86, 100–101. The concept of a fair hearing does not include a right of confrontation as a universal necessity.

III

Petitioner's argument falls with his mistaken premise that there is an absolute right of literal confrontation in deportation proceedings. Due process is afforded where there is no proper objection to the taking of the depositions and where there

is full opportunity to cross-examine the witnesses whose depositions are received.

A. From the time of the first Congress to the present (Rule 26 (d), F. R. Civ. P.), the use of depositions in a civil judicial proceeding, where the witnesses live at a distance and under other conditions of unavailability, has been accepted as a normal and acceptable procedure. While latitude is given the court on application of the party against whom the deposition is to be used to modify a deposition order in particular cases, such relief must be sought if its absence is to be a basis for a claim of unfairness. Otherwise, a deposition may be used against a party who had due notice of the taking.

The use of depositions in administrative proceedings is no more restricted, and is a normal method to be exercised at the discretion of a presiding officer, who can shape his order according to the exigencies of the particular case to an even greater extent than in formal litigation in court proceedings. As under the Federal Rules of Civil Procedure, it is incumbent on a party who feels that the deposition procedure would produce some special disadvantage to make timely objection so that the hearing officer may make some appropriate modification of his order.

B. As in civil court litigation and in other administrative proceedings, the use of depositions in deportation proceedings is permissible and has been properly authorized by the governing regu-

lations. The rights of the alien under this procedural scheme have been fully protected. He may, if it appears that a motion to take depositions will produce some special disadvantage, pray for some appropriate modification of the order. Under the general power delegated to the hearing officer, such problems can be worked out in the particular case on proper application. And on notice that depositions are to be taken, the alien has the implicit right to an opportunity to be represented by counsel at the taking—an opportunity given but not availed of by this petitioner. The deportation proceeding was presided over by a disinterested hearing officer of the appropriate district who, more than a mere notary, could participate in the questioning at any point if he deemed that necessary to protect the alien or complete the record. Such procedure does not violate fundamental notions of administrative due process.

IV

There were no special circumstances in this case making it a due process requisite that, in addition to the full opportunity for cross-examination, petitioner should have been given transportation at government expense for himself and his counsel to the place where the depositions were taken. Petitioner emphasizes in this connection the advantage his presence would have afforded for identification purposes. But identification was not a disputed issue. Not only did

he admit his identity, but the depositions left no doubt on the issue.

Petitioner also stresses the fact that all of the affirmative evidence directed to the issue of his past Communist Party membership while resident in Hawaii was developed through deposition testimony. However, the depositions were taken after petitioner had been given ample opportunity to have the witnesses cross-examined. Accordingly, this evidence was appropriately considered in the deportation hearing, as it would have been in a judicial trial. The task of evaluation belongs to the immigration officers in any event and their decision in this respect is made final by statute, especially as against collateral attack.

Although he does not now contest the legality of his detention without bail, petitioner, to buttress his argument that the Service should have "secured" his presence at the deposition taking, stresses the fact that he was continuously in custody at that time. But his detention only supports his argument on the assumption that he had an absolute right to be present at the deposition taking, and was prevented from attending because of the refusal of the Service to allow him to be present. This was not the case. He made no unequivocal request that he be allowed to attend, and he made no move to meet the deposition evidence in any manner, although given the opportunity. It is reasonable on these facts

to assume this was deliberate and not because of the deprivation of any procedural right to which he was entitled.

ARGUMENT

Petitioner argues that due process, as measured by the fundamental concepts of fairness, was violated by the introduction at the deportation hearing of depositions taken in Hawaii to establish the critical fact of his past membership in the Communist Party in Hawaii. He urges that the consequences to the individual alien of deportation are so serious that ordinary procedural standards governing deposition testimony, appropriate to civil or administrative proceedings, are inapplicable in this context—that the mere opportunity to have deposition witnesses cross-examined by counsel is inadequate. He asks this Court to import, as a procedural requirement in deportation proceedings, the principle of confrontation applicable by virtue of the Sixth Amendment to criminal trials, *i. e.,* the physical presence of the alien during the testimony of all witnesses. In this view, it is irrelevant that petitioner might have sought and obtained either his own presence or that of counsel at the deposition-taking (at his own expense), or made application for some alternative method of ~~processing~~ proceeding. It is also irrelevant that he himself had previously opposed the transfer to Hawaii of hearings under a prior warrant. His position, as we understand it,

is that anything short of personal confrontation of the deponents renders the depositions inadmissible against him.

Since what is due process can usually be determined only on the facts or circumstances of the particular case,[4] we shall first undertake to show that the four hearings which culminated in the order for petitioner's deportation were demonstrably fair; that petitioner was afforded every opportunity to present a defense to the charges in the warrant, but failed to do so; that he was given notice and reasonable opportunity consistent with the nature of the proceedings to have the government witnesses cross-examined in the deposition-taking. Then we shall show that procedural due process in a deportation hearing does not necessarily require the right to confront a witness who is far removed from the place of inquiry; and, finally, that, in this case, the use of deposition testimony was in accord with concepts of due process.

I

THE RECORD ESTABLISHES THAT PETITIONER WAS IN FACT ACCORDED EVERY OPPORTUNITY TO DEFEND THE CHARGES AGAINST HIM, TO HAVE GOVERNMENT WITNESSES CROSS-EXAMINED, AND TO MEET THEIR TESTIMONY WITH REBUTTAL TESTIMONY

Since petitioner's arguments are predicated on the assumption that his order of deportation was

[4] *Betts* v. *Brady*, 316 U. S. 455; *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233.

the product of a series of hearings fatally infected by the use of what he terms "ex parte depositions" to prove the critical issue of past membership in the Communist Party of the United States, and that he was given no proper opportunity to meet such testimony in a manner consistent with procedural fairness, it is appropriate to review at the outset the history of the proceeding which culminated in the order of deportation. Such a review demonstrates that petitioner had every opportunity to have the deposition witnesses cross-examined, and that his failure to have counsel represent him at the deposition-taking or to make other arrangements consistent with the nature of the proceeding was at his own election.

The proceedings before the Immigration and Naturalization Service were commenced on October 31, 1950, with the issuance of a warrant of arrest. At this time petitioner was represented by competent counsel who had been appearing in his behalf in a series of hearings before the Service under a prior warrant issued over a year before and who was familiar enough with his case to institute habeas corpus proceedings in the district court, within four days after petitioner's arrest, to challenge the legality of his detention without bail.

When the first of four deportation hearings was convened on November 22, 1950, petitioner immediately sought the first of a number of con-

tinuances to prepare a defense which never ultimately materialized. This was denied pending some showing by the government of the evidence it would produce and to avoid the prolongation of petitioner's detention. When petitioner was called to the stand, he would not even state his name on the ground that he was unprepared to do so, and his counsel indicated that he would take the same position as to all other questions asked him. When he was asked questions concerning his past Communist Party membership, he refused to answer both on that ground and on the claim of privilege against self-incrimination. Documents were admitted into evidence which established his identity and the fact of his alienage (both of which he later conceded), and the only material matter left for proof was the fact of his past membership in the Communist Party while residing in Hawaii some years before—a charge he neither then nor subsequently affirmed or denied.

The examining officer (presenting the case for the Service) then moved to take the depositions of four witnesses living in Honolulu, explaining that they were residents of Hawaii and that the government expected to adduce testimony through them bearing on the fact of past Communist Party membership. Petitioner's counsel renewed his objection of unpreparedness and his attack on the legality of the hearing. He was given the opportunity to enlarge upon his ob-

jections in a written brief but failed to do so. What is here significant is that petitioner's counsel made no suggestion that his client was unable to afford either to send him to Hawaii or to retain associate counsel in Hawaii. Neither did he suggest that petitioner desired to go there for the deposition taking. He did not make any specific showing that it was necessary that he confront the witnesses there. Counsel's objection was merely that the examining officer had "not offered to have counsel or the respondent or both present at the Government's expense" (R. 118).

Whether the examining or the hearing officer was aware that petitioner, through his then counsel, had previously objected to the transfer of a deportation hearing to Hawaii does not appear from the record. However, they obviously knew that this hearing was scheduled to be held in California, and that there was no motion by petitioner to transfer the entire hearing to Hawaii, where the witnesses were. The hearing officer could reasonably assume that the witnesses in Hawaii, far removed from the place of the hearing, would not appear and testify except under the compulsion of a subpoena. The very nature of the issues and the kind of testimony sought buttresses this assumption. Whether or not an administrative subpoena could have been effectively used to compel these witnesses to travel from Hawaii to Los Angeles poses both legal and practical problems which must have been appar-

ent to the hearing officer who decided against such procedure. Aside from the expense involved, it is clear that to compel witnesses to leave their homes and occupations and travel several thousand miles might well produce situations of individual hardship. Some witnesses under such circumstances, either because of age or ill health, might be precluded from attending. Others might require postponement for various reasons; still others might be recalcitrant and refuse to attend. And since the Service has no power to enforce its subpoenas except through resort to court enforcement proceedings, longer delays might have extended still further the period during which the hearing was pending and the petitioner was being held without bail. The hearing officer was therefore justified in permitting the use of the normal procedure for obtaining the testimony of distant witnesses, *i. e.,* by formal depositions.

Subsequently, on December 7, 1950, both petitioner and his counsel were served with notice of the taking of the depositions in Honolulu on December 18th and 19th. This notice was met with complete silence. The record indicates that petitioner was in communication with a law firm in Honolulu about the case, and that at one point it was contemplated that such firm would represent petitioner at the deposition taking. See p. 9, *supra.* However, at the time of the deposition proceeding in Honolulu, one of the partners

told the Service officer that, although he had contemplated entering an appearance for petitioner, he would not do so and would not be present to cross-examine the deponents. Up to the time the depositions were taken, there was no indication from petitioner that he was unable to have counsel of his choice present at the proceedings, nor was there any unequivocal request that he be allowed to attend himself. And there was no showing that the matter could not be adequately handled by local Honolulu counsel.

After it was noted of record that petitioner and his counsel had both been notified of the deposition taking, the questioning by a Service examining officer was conducted before a hearing officer who presided over the Honolulu deposition proceedings.

The transcript of the depositions was sent to petitioner's counsel on January 22, 1951, with a request that cross interrogatories be prepared and submitted. There was still no response from petitioner's counsel despite continued efforts to reach him. On March 13, 1951, the deportation hearing was convened for the second time in California. Despite the fact that petitioner's counsel had had the transcript of the depositions for several weeks, his motion for a continuance was granted so that he and petitioner might study the testimony and decide whether to submit cross interrogatories. There was still no suggestion by petitioner that he had been or was at that time

unable to procure counsel in Honolulu to conduct an adequate cross-examination of the witnesses there.

On March 28, 1951, when the deportation hearing was resumed, no cross interrogatories had been prepared. Petitioner's counsel objected to the introduction of the depositions, not on the ground that his client had been unable financially or otherwise to have the Honolulu witnesses cross-examined, but on the ground that the government had failed to assume the burden of transporting petitioner and his Los Angeles counsel to Honolulu to confront the witnesses there. The hearing officer replied that the government has no such burden, and overruled the objection on that ground. In a later colloquy petitioner's counsel said it would have been "impractical" for an attorney other than his Los Angeles counsel to have conducted the cross-examination in Honolulu without petitioner's presence and assistance, but he did not specify the reasons for his conclusion; nor did he explain why cross interrogatories could not now be prepared with petitioner's assistance, on the basis of the deponents' direct testimony. The hearing officer stated that there was no question but that petitioner could have been represented in Honolulu, and the examining officer observed that, had he made any request therefor, petitioner could have been present under guard at the deposition taking.

Petitioner was then recalled to the stand. After admitting his identity and the fact of alienage, he refused to answer all questions relating to past Communist Party membership on the ground of First and Fifth Amendment privileges. He also refused, on the same grounds, to state whether he even knew the four government witnesses. Petitioner's counsel again moved for a continuance to prepare a defense. He stated that he needed time to communicate with Honolulu to ascertain what evidence was available to meet (R. 212) "the import, if not some of the specific statements made by the witnesses" in the depositions. He indicated that he did not know whether some of his evidence would be given through witnesses appearing in Honolulu since he had not yet found such witnesses, but that he presumed he might have evidence to present there. On the strength of these statements, petitioner was granted a continuance so that he might ascertain and state what evidence he wished to present.

At the fourth and final hearing on April 19, 1951, petitioner moved that either the deposition witnesses be brought to Los Angeles, or that petitioner be taken at government expense to Honolulu to be present at a cross-examination of those witnesses. In opposition to this motion, the examining officer stated that the Service does not deem it obligatory to transport witnesses thousands of miles; that, had petitioner requested it, he could have been present at the deposition tak-

ing; and that neither petitioner nor his counsel had seen fit to make such request or to present cross interrogatories so that the witnesses might be cross-examined. The motion was denied. Petioner had no evidence to produce by way of defense. His only further act was to make another of a series of motions for continuance to find a witness to testify as to the real character of the Communist Party of the United States. This motion was properly denied on grounds of irrelevancy.[5]

In his exceptions to the hearing officer's decision, petitioner did not contend that he had not had the opportunity to have the government witnesses cross-examined, nor did he assert that he had been financially unable to procure counsel in Honolulu, or to pay the expenses for himself or his Los Angeles counsel to go to Honolulu. His objection was predicated on the fact that the depositions were taken (R. 66) "without provision being made for the transportation to Hawaii of the respondent or his counsel." It was apparently not until petitioner appeared before the Board of Immigration Appeals in March 1952 (See R. 56), through three new attorneys of record, that he made the assertion that he had been financially unable to have a representative appear for him at the deposition taking. At that time the ad-

[5] The Internal Security Act of 1950 had dispensed with the need for proof as to the nature of the Communist Party. *Galvan* v. *Press*, 347 U. S. 522.

ministrative proceedings had been pending for over two years, due in large measure to petitioner's postponements.

This record justifies several conclusions which in large measure destroy the assumptions on which petitioner bases his legal arguments. In the first place, the two witnesses whose testimony was deemed to establish the fact of Communist Party membership as charged in the warrant were not cross-examined only because petitioner elected not to be represented by counsel at the deposition-taking in Honolulu. Petitioner did not claim that he was unable to employ counsel to represent him there. He did not unequivocally declare that he desired to be allowed to attend the Honolulu proceedings personally. Aside from the flat statement that it was impractical to be represented by Hawaiian counsel, he made no showing to such effect. In fact it was not until after the depositions were actually taken that he specified the real basis of his objection, and then it was, not that he had been denied the opportunity to be represented at the proceedings to cross-examine the witnesses, but that the government had failed to *confront* him with the witnesses, which procedure he claimed as a matter of right.[6] Although he persistently characterizes

[6] We have throughout our argument used the term "confrontation" in the sense that petitioner uses it, *i. e.* (Pet. Br. 57), "Mandatory, Secured Right of Presence of the Accused". It should be noted, however, that the term is

the depositions as "ex parte", they were "ex parte" only in the sense that petitioner, having been afforded the opportunity to have counsel represent him, chose not to have the witnesses cross-examined.

The record refutes petitioner's contention that he was subjected to a "total trial in absentia." Not only was he given the opportunity to cross-

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often used in a broader sense in civil practice to mean opportunity for cross-examination, a privilege granted petitioner in this case. This use of the term is discussed by Professor Wigmore as follows (V Wigmore, *Evidence* (3d ed., 1940) Sec. 1365, p. 27):

"CROSS-EXAMINATION AND CONFRONTATION. The essential requirement of the Hearsay rule, as just examined, is that statements offered testimonially must be subjected to the test of Cross-examination. But a process commonly spoken of as *Confrontaiton* is also often referred to as an additional and accompanying test or as the sole test.

"Now Confrontation is, in its main aspect, *merely another term for the test of Cross-examination.* It is the preliminary step to securing the opportunity of cross-examination; and, so far as it is essential, this is only because cross-examination is essential. The right of confrontation is the right to the opportunity of cross-examination. Confrontation also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the witness' demeanor on the stand, as a minor means of judging the value of his testimony. But this minor advantage is not regarded as essential, *i. e.* it may be dispensed with when it is not feasible. Cross-examination, however, the essential object of confrontation, remains indispensable.

"The details of this distinction are elsewhere to be examined * * *; it is enough to note here that, as far as confrontation is an indispensable element of the Hearsay rule, it is merely another name for the opportunity of cross-examination."

examine the deposition witnesses through counsel or by means of written interrogatories, both before and after the deposition-taking, but in three subsequent hearings before the hearing officer he was also given the opportunity to interpose objections to the depositions generally, and then to object to the questions and answers one by one. In addition, every opportunity was given him to present rebuttal evidence, which he always promised but significantly never produced. This included a full opportunity to produce for questioning in Hawaii witnesses who his counsel suggested might be available. His only offer of proof during the two years of the administrative proceedings was an offer to produce the national secretary of the Communist Party of the United States to show that that organization did not have the character which Congress deemed it to have in making the fact of membership ground for deportation.

These facts—together with his refusal to either affirm or deny his Communist Party membership, his refusal to identify the deposition witnesses when questioned, his admitted consideration of the feasibility of appointing local counsel in Honolulu and subsequent rejection of such plan as "impractical," and his dilatory tactic of seeking continuances which protracted the proceeding—support the inference that petitioner was less interested in meeting the thrust of the deposition testimony than in attempting to create

a situation on which he could later build an argument of prejudicial error. The weakness of his case before the Service arose, not out of any denial of procedural fairness, but because he elected not to contest on its merits the case against him.

II

SINCE DEPORTATION PROCEEDINGS ARE NOT GOVERNED BY THE CONSTITUTIONAL LIMITATIONS IMPOSED ON CRIMINAL TRIALS, THERE IS NO ABSOLUTE RIGHT THAT THE ALIEN BE PERSONALLY PRESENT WHEN WITNESSES ARE EXAMINED

While petitioner concedes that deportation proceedings are not "to be technically classed as" equivalent "to criminal proceedings" (Pet. Br. 28), the premise of his entire argument is that the analogy is so close as to require that the alien be accorded the same right as an accused in confronting the witnesses against him on "[i]dentical considerations of Constitutional principle" (Pet. Br. 57). On this assumption he draws on the precedent and authority of various criminal cases and criminal law texts (Pet. Br. 28–56), many concerned with Sixth Amendment problems, to prove his contention that the use of depositions in this case violated his right under the Fifth Amendment to due process of law.

This attempt to impose on the deportation process the restrictions which the Constitution impresses on a criminal trial has been foreclosed by well-established precedents of this Court to the contrary. *E. g., Harisiades* v. *Shaughnessy,*

342 U. S. 580, 594–595; *Carlson* v. *Landon,* 342 U. S. 524, 537–538; *Mahler* v. *Eby,* 264 U. S. 32, 38–39; *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 157; *Lewis* v. *Frick,* 233 U. S. 291, 302; *Bugajewitz* v. *Adams,* 228 U. S. 585, 591; *Zakonaite* v. *Wolf,* 226 U. S. 272, 275; *Low Wah Suey* v. *Backus,* 225 U. S. 460, 470–471; *Nishimura Ekiu* v. *United States,* 142 U. S. 651. Deportation is neither a criminal action nor a punishment for crime, but a civil or administrative remedy, committed to the executive arm of government, to rid the country of aliens whose presence Congress has deemed undesirable. Its procedures are administrative (cf. *Marcello* v. *Bonds,* 349 U. S. 302; *Wong Yang Sung* v. *McGrath,* 339 U. S. 33), and, while summary, are adapted to the end sought. *Zakonaite* v. *Wolf, supra* (226 U. S. at p. 275); *The Japanese Immigrant Case* (189 U. S. 86, 100–101). That end is not the infliction of punishment but the "revocation of a privilege voluntarily granted." *Helvering* v. *Mitchell,* 303 U. S. 391, 399.

It is true, of course, that a deportation order, even though not inflicted as a punishment, has such a serious impact on the personal life of an alien that strict adherence to the rules of procedure established for the deportation hearing has been enforced (*Bridges* v. *Wixon,* 326 U. S. 135, 153–154), and a rule of strict construction has been applied in the interpretation of statutes affecting deportation. *Barber* v. *Gonzales,* 347

U. S. 637, 642–643; *Jordan* v. *DeGeorge,* 341 U. S. 223, 231. But this does not justify the assumption that the constitutional guarantees available to an accused in a ~~criminal~~ *criminal* trial are automatically to be transposed to the dissimilar administrative process which governs deportation hearings. As this Court stated in *Zakonaite* v. *Wolf,* 226 U. S. 272, 275, "a proceeding to enforce such regulations [immigration] is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments".

The right of confrontation of witnesses guaranteed the accused in a criminal trial derives, not from any fundamental notions of fairness implicit in the due process secured by the Fifth Amendment to a litigant in any proceeding, but directly from the Sixth Amendment (*supra,* pp. 2–3), which applies by its terms only to "criminal proceedings". This Court so held in *United States v. Zucker,* 161 U. S. 475, where the United States proceeded against importers to recover the value of merchandise under the provisions of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 131, Sec. 9, charging certain fraudulent practices which resulted in an alleged forfeiture. At the trial the government offered to read into evidence a deposition which had been taken in Paris, France, under letters rogatory, and the defendants objected to the admission of such testimony on the following grounds (*id.* at p. 477):

1. That this action, though civil in form, was in substance a criminal case, and, under the Constitution of the United States, the defendants were entitled on the trial "to be confronted with the witnesses" against them.
2. That "the constitutional right of the defendants to be confronted with the witnesses against them is not secured by giving them notice of the execution of letters rogatory in France, and that their failure to attend on such occasion at a place three thousand miles from the place of trial, out of the district and in a foreign country, does not operate as a waiver of their constitutional right, if it can be waived."

This Court, rejecting these arguments, unanimously held as follows (*id.* at p. 481):

> The Sixth Amendment relates to a prosecution of an accused person which is technically criminal in its nature. * * * The words, in the Sixth Amendment, "to be informed of the nature and cause of the accusation," obviously refer to a person accused of crime, whether a felony or misdemeanor, for which he is prosecuted by indictment or presentment, or in some other authorized mode which may involve his personal security. So the clause declaring that the accused, in a criminal prosecution, is entitled "to be confronted with the witnesses against him," has no reference to any proceeding (although the evidence therein may disclose, of necessity,

> the commission of a public offence) which is not directly against a person who is accused, and upon whom a fine or imprisonment, or both, may be imposed.

See also *Hepner* v. *United States,* 213 U. S. 103, 109–111, which restated with approval the holding of the *Zucker* case, and *Low Wah Suey* v. *Backus,* 225 U. S. 460, 470–471, where this Court held that the Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor" (*supra.* pp. 2–3) was not a constitutional requisite in a deportation proceeding.

We find no support in the cases cited by petitioner for the proposition that due process of law, particularly due process in the context of an administrative proceeding in deportation, requires a "mandatory right of presence" of the alien whenever any testimony is taken. As we have indicated, the extensive list of criminal cases collected by petitioner (Pet. Br. 31–56) is governed by different constitutional considerations. The cases relating to state insanity (Pet. Br. 76–90) and asexualization proceedings (Pet. Br. 90–96), even if they were otherwise persuasive for petitioner's point, bear scant resemblance to deportation proceedings. They find their authority in state statutes, and involve the private interests of individuals, particularly individuals who are so incapable of protecting their own interests in the proceedings as to require a special type of court supervision. The power of Congress over

the admission of aliens and their right to remain is far broader, touching basic aspects of national sovereignty and problems of national relations. Its exercise is non-judicial in nature and is committed to the executive branch of government for administration. *Galvan* v. *Press,* 347 U. S. 522, 530.

Two circuits have ruled squarely against petitioner's attempt to interject into deportation procedures the right of confrontation secured to an accused in a criminal proceeding. See *Bhagat Singh* v. *McGrath,* 104 F. 2d 122, 123 (C. A. 9), certiorari dismissed, 308 U. S. 629; *Singh* v. *District Director,* 96 F. 2d 969 (C. A. 9); *Berkman* v. *Tillinghast,* 58 F. 2d 621 (C. A. 1). The *Berkman* case involved a factual situation analogous to the instant one except that there, unlike here, the alien made a request that she be taken to the deposition proceeding and that the expenses of local counsel that she could not afford be defrayed. The Court of Appeals for the First Circuit held as follows (58 F. 2d at p. 622):

> The Hynes evidence was objected to on the ground that, although the petitioner was notified when and where the deposition would be taken, the government refused her request to be sent to Los Angeles to be present personally at the taking of it, and she was unable by reason of poverty to be represented by counsel. As deportation proceedings are civil in their nature, it is not essential that the defendant should be

> confronted by the witnesses; evidence may be obtained by deposition. The testimony of Lieutenant Hynes was taken in a manner which amounted to an open commission with due notice to the opposite party. It was the duty of the government to see that the witness was fairly and fully examined. In administrative proceedings the government officials are not mere prosecutors, but are under a strict duty to see that the interests of the accused person are properly safeguarded. This did not, however, preclude them from taking testimony at a distance, nor, if they did so, impose upon the government the burden, either of transporting the defendant to the place where the witness was examined, or of paying counsel to represent her there. The testimony of Lieutenant Hynes appears to have been fairly taken. No suggestion has been made for the petitioner of anything favorable to her side which might have been brought out and was not. The printed and documentary exhibits were promptly shown to the petitioner or her counsel, and she was afforded an opportunity to meet them.

The specific problems of procedural fairness in this case are further discussed below (pp. 65–70, *infra;* see also pp. 29–41, *supra*). Our point here is that the courts have rejected, and should reject, petitioner's basic premise that there is in deportation proceedings *an absolute right of confrontation* such as pertains in criminal cases. Deportation has always been deemed an admin-

istrative rather than a judicial process. Cf. *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 157; *Zakonaite* v. *Wolf*, 226 U. S. 272, 275; *The Japanese Immigrant Case*, 189 U. S. 86, 100–101. Whether petitioner was accorded "due process of law" depends, not on whether his hearing was conducted "according to the forms of judicial procedure" in criminal cases, but on whether the administrative hearings followed procedures "that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which [administrative] officers are required to act". *The Japanese Immigrant Case, supra* (189 U. S. at pp. 100–101). The use of deposition testimony has, as we show below, always been recognized as a fair method of procedure in both administrative and civil judicial proceedings. There is, therefore, no constitutional bar to the use of such testimony in deportation proceedings.

III

THE USE OF DEPOSITION TESTIMONY IN DEPORTATION PROCEEDINGS IS IN ACCORD WITH DUE PROCESS

In the absence of an absolute right of confrontation in deportation cases, petitioner's general argument against the use of depositions must fail. The standard of due process in a deportation hearing is the standard of fundamental fairness, and there is nothing unfair in the use of

deposition evidence with full right of cross-examination such as was afforded petitioner in this case.

A. THE USE OF DEPOSITION TESTIMONY HAS LONG BEEN RECOGNIZED AS A FAIR METHOD OF PROCEEDURE

In the trial of civil actions, proof of the issues through depositions has been historically recognized as valid. In fact, the first Congress, in the Judiciary Act of September 24, 1789 (Sec. 30, 1 Stat. 73, 88–90), provided for the taking of depositions *de bene esse* of witnesses living at a distance greater than one hundred miles and under other circumstances of unavailability. Cf. *Whitford* v. *Clark County*, 119 U. S. 522; *Patapsco Insurance Co.* v. *Southgate*, 5 Pet. 604, 616–617; *The Argo*, 2 Wheat. 287; *Pettibone* v. *Derringer*, 4 Wash. C. C. R. 215, 219; *United States* v. *One Case of Hair Pencils*, 1 Paine's C. C. R. 400. The conditions under which deposition testimony could be taken for evidentiary use, originally prescribed in the 1789 statute, are now set out in Rule 26 (d) of the Federal Rules of Civil Procedure.[7] Under

[7] "*Use of depositions.* At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

* * * * *

"(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

this Rule depositions can be used against "any party who was present or represented at the taking of the deposition or *who had due notice thereof* * * *" (emphasis added). The rules governing the taking and use of depositions (Rules 26–33, F. R. Civ. P.) do not, of course, provide any inflexible formula which must be applied in all cases in the same manner. If a litigant feels that he may be oppressed by the taking of a deposition he may move the court to limit the examination in some reasonable way, and the court has a certain area of discretion to do so. Rule 30 (b) and (d). Cf. *Hyam* v. *American Export Lines,* 213 F. 2d 221 (C. A. 2); *Gitto et al.* v. *"Italia", Societa Anonima Di Navigazione,* 28 F. Supp. 309 (E. D. N. Y.). However, such relief must be applied for by the party affected, and a plea for modification must be supported by some reasonable showing to justify it.

The use of depositions in administrative proceedings is no more circumscribed. Provision is

1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used."

made in Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) that a presiding officer can "take or cause depositions to be taken whenever the ends of justice would be served thereby". This broad grant leaves the details of administration to the discretion of the administrators to an even greater extent than do the Federal Rules of Civil Procedure, and provides that flexibility which is an essential of the administrative process. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 143. Unlike the situation in judicial litigation, where the parties themselves procure the taking of depositions, Section 7 gives the presiding officer the power, to be exercised under such conditions as are appropriate to the facts of the particular hearing.[8] Manifestly, if there are specific reasons why a party

[8] Other statutory provisions granting the power to hearing officers in administrative proceedings do likewise. See 5 U. S. C. 498 (Dept. or Interior); 5 U. S. C. 118k (d) (Civil Service Commission); 7 U. S. C. 499m (d) (Perishable Commodities Act); 7 U. S. C. 1603 (Federal Seed Act); 8 U. S. C. 1443d, 1446 (b) (Immigration and Nationality Act of 1952 (naturalization proceeding)); 15 U. S. C. 49 (Federal Trade Commission Act); 15 U. S. C. 155 (China Trade Act); 15 U. S. C. 717m (Natural Gas Act); 16 U. S. C. 825F (Federal Power Act); 19 U. S. C. 1333 (d) (Tariff Act); 22 U. S. C. 1623 (d) (International Claims Act); 25 U. S. C. 70q (Indian Claims Act); 26 U. S. C. 1114 (Tax Court); 29 U. S. C. 161 (National Labor Relations Act); 30 U. S. C. 475 (j) (Coal Mine Safety Board of Review); 33 U. S. C. 927 (Longshoremen's and Harbor Workers' Comp. Act); 35 U. S. C. 23–24 (Patent Act); 47 U. S. C. 409 (h) (Federal Communications Commission Act); 49 U. S. C. 12 (Interstate Commerce Act); 49 U. S. C. 459, 644 (Civil Aeronautics Act).

deems the use of depositions unfair in a particular case, it is incumbent on such party to make his showing. In the absence of a showing, the deposition procedure is the usual and normal method of taking the testimony of distant witnesses in both judicial and administrative proceedings.

B. THE USE OF DEPOSITION TESTIMONY WAS AUTHORIZED BY THE REGULATIONS GOVERNING DEPORTATION HEARINGS

While petitioner does not claim that the use of depositions was unauthorized by the regulations that governed his deportation hearings, we think it well to point out that the published regulations applicable to petitioner's case explicitly and clearly authorized the use of deposition testimony. The hearings in this case were all conducted between November 22, 1950, and April 19, 1951, and the order of deportation was handed down on August 1, 1951. The governing procedures were, therefore, those prescribed in the regulations of November 10, 1950, promulgated under authority of the Immigration Act of 1917, as amended (15 Fed. Reg. 7637–7639). Those regulations embodied significant changes in procedures of the Immigration and Naturalization Service to bring deportation hearings into conformity with procedures followed by other agencies of the government, and to insure a higher degree of fairness than had previously obtained, but the Service's procedures continued, as they had for years, to authorize and contemplate the use of statements and depositions.

Before 1950, the differentiation between the investigative and the adjudicative functions of the Service had not been clearly defined. The investigating officer was entitled to interrogate under oath or affirmation not only the alien but others, and to record such testimony for possible use in a future hearing (8 C. F. R. (1949 ed.) 150.1).[9]

At the hearing, the presiding inspector (who, in some instances, was both the advocate for the government and the adjudicator in the same case) was given broad latitude both as to the evidence

[9] This power was derived from Section 16 of the Immigration Act of 1917, as amended (39 Stat. 889, 58 Stat. 714, 8 U. S. C. (1946 ed.) 152). Section 16 gave immigration inspectors authority to administer oaths and "to take and consider evidence touching the right of any alien to * * * reside in the United States, and, where such action may be necessary, to make a written record of such evidence * * *." The concomitant power was also given district directors and inspectors in charge "to require by subpoena the attendance and testimony of witnesses before said inspectors * * * touching the right of any alien to * * * reside in * * * the United States * * *." See *United States* v. *Minker*, No. 35, this Term, decided January 16, 1956; *United States* v. *Vivian*, 224 F. 2d 53 (C. A. 7), certiorari denied January 23, 1956, No. 322, this Term; *Loufakis* v. *United States*, 81 F. 2d 966 (C. A. 3); *Graham* v. *United States*, 99 F. 2d 746 (C. A. 9); see also *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 54 (dissenting opinion of Mr. Justice Reed).

Prior to 1917, there was no compulsory process by which the testimony of witnesses could be obtained, and this Court in *Low Wah Suey* v. *Backus*, 225 U. S. 460, 470–471, held that such provision was not a constitutional requisite in deportation proceedings.

which could be admitted, and the evidence which, after admission, he could consider as having probative value in arriving at his findings. Recorded statements obtained during investigations were admissible under the following circumstances (*id.*, 150.6 (i)):

> *Use of statements or admissions made during investigation.* A recorded statement made by the alien (other than a General Information Form) or by any other person during an investigation may be received in evidence only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statements made during the investigation. An affidavit of an inspector as to the statements made by the alien or any other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable in person.

See p. 627, *The Immigration and Naturalization Systems of the United States,* S. Rep. No. 1515, 81st Cong., 2d Sess. In other instances where government witnesses were unavailable, their ex parte statements could be admitted and given evidentiary weight, subject only to the necessary recognition that such evidence was procured with-

out opportunity for cross-examination.[10] A limitation on this authority was that where such evidence was used, it was incumbent to show that the maker of the statement could not reasonably be produced. Cf. *Navarrette-Navarrette* v. *Landon,* 223 F. 2d 234 (C. A. 9), pending on petition for a writ of certiorari, No. 201 Misc., this Term; *United States ex rel. Impastato* v. *O'Rourke,* 211 F. 2d 609 (C. A. 8), certiorari denied, 348 U. S. 827; *Kishan Singh* v. *District Director,* 83 F. 2d 95 (C. A. 9), certiorari denied, 299 U. S. 561. And because a Service regulation required it, it was mandatory that a recorded statement taken before the hearing must have been taken under oath, thus insuring "an important safeguard—the fear of prosecution for perjury." *Bridges* v. *Wixon,* 326 U. S. 135, 153.

While the regulations prior to 1950 did not grant specific authority to the Service to take depositions of absent witnesses (as opposed to sworn statements and affidavits), it was well settled that the Service had such power, derived from its authority to administer oaths and to issue

[10] See *Kishan Singh* v. *District Director,* 83 F. 2d 95 (C. A. 9), certiorari denied, 299 U. S. 561; *United States ex rel. Ng Wing* v. *Brough,* 15 F. 2d 377 (C. A. 2); *United States ex rel. Diamond* v. *Uhl,* 266 Fed. 34 (C. A. 2); *Choy Gum* v. *Backus,* 223 Fed. 487, 493 (C. A. 9). Cf. *United States ex rel. Bilokumsky* v. *Tod,* 263 U. S. 149, 157. Some of the problems presented where ex parte statements and hearsay evidence were relied on to establish deportation charges without opportunity for cross-examination are discussed in a study made by the Secretary of Labor's Committee on Administrative Procedure, entitled *The Immigration Service* (Dept. of Labor Mimeograph, 1940, at pp. 87–89).

subpoenas under Section 16 of the 1917 Immigration Act (*supra,* p. 53, fn. 9).[11] The duty of the Service to allow counsel to be present at the taking of such depositions was recognized, but it was also recognized—as shown in Point II, *supra*—that the Service was not obliged to send either the alien or his counsel to the deposition proceeding at government expense, or to provide for the confrontation of the deponents by the alien. *Berkman* v. *Tillinghast,* 58 F. 2d 621 (C. A. 1); *Bhagat Singh* v. *McGrath,* 104 F. 2d 122 (C. A. 9), certiorari dismissed, 308 U. S. 629; *Singh* v. *District Director,* 96 F. 2d 969 (C. A. 9); *Kishan Singh* v. *District Director,* 83 F. 2d 95 (C. A. 9), certiorari denied, 299 U. S. 561; Section 756.8, *Immigration Manual* (Government Printing Office, 1946). And while it was required that the alien be notified of the time and place of the deposition proceedings, it was not considered fatal if the alien was unable to attend personally or to send counsel. Section 756.8 (b), *Immigration Manual, supra.*

Following this Court's decision in *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (1950), holding that the administrative hearings in proceedings for the deportation of aliens must conform to the

[11] The subpoena power was exercised at the request of the alien where he could show that he had made diligent effort to produce the evidence otherwise and could also show the materiality of the evidence he hoped to produce. Sections 756.8, 982–984, *Immigration Manual* (Government Printing Office, 1946).

requirements of the Administrative Procedure Act, and that the commingling of the accusatory and adjudicative functions in one presiding inspector was in violation of that Act, regulations (15 F. R. 1297–1302, March 10, 1950) were promulgated to meet the standards of the Administrative Procedure Act.

When, thereafter, Congress, in a rider to the Appropriation Act of September 27, 1950, 64 Stat. 1048, exempted deportation hearings from the procedural requirements of the Administrative Procedure Act,[12] new regulations were enacted (see 15 F. R. 7637–7639) to be effective as of November 10, 1950, which in large measure retained the procedural reforms initiated in the March 1950 regulations and later incorporated into the Immigration and Nationality Act of 1952. These were the regulations in effect at the time of petitioner's hearing.

Under these regulations, a "hearing officer" was provided to conduct the hearing (8 C. F. R. (1951 Supp.) 151.1), who would take no part in case preparation but would function as an adjudicator. His duties in regard to the conduct of the hearing were spelled out in some detail,[13]

[12] *Marcello* v. *Bonds*, 349 U. S. 302, 306, 312; Besterman, *Commentary on the Immigration and Nationality Act*, Title 8, U. S. C. A. (1953 ed.), pp. 48–50.

[13] 8 C. F. R. (1951 Supp.) 151.2 provided in pertinent part:

"(b) *Hearing Officer; general duties.* The hearing officer shall conduct a fair and impartial hearing. He shall use his independent judgment in rendering his decision and shall

as were those of the examining officer.[14] In addition, the hearing officer was given the following

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not perform any duties inconsistent with the duties and responsibilities of an adjudicating officer, except as provided in this part. He shall certify that to the best of his knowledge and belief the record is a true report of everything that was stated during the course of the hearing, including oaths administered and the rulings on objections, except statements made off the record. The hearing officer shall exclude from the record any evidence that is irrelevant, immaterial, or unduly repetitious. He may, within his discretion, exclude from the record any arguments in support of objections, but, in such event, the alien or his counsel or representative may submit argument in the form of a brief to accompany the record.

"(c) *Hearing officer; specific duties.* At the commencement of the hearing under the warrant of arrest, the hearing officer shall (1) place the alien under oath or affirmation, (2) enter of record a copy of the warrant of arrest and explain to the alien in simple, understandable language the nature of the charges contained therein, and (3) advise the alien, if not represented by counsel or other qualified representative, that he may be so represented if he desires and require him to state then and there for the record whether he desires such representation. * * *"

[14] 8 C. F. R. (1951 Supp.) 151.2 (f) provided in pertinent part:

"* * * The examining officer shall in such cases conduct the interrogation of the alien and of the witnesses on behalf of the Government and the examination or cross-examination of the alien's witnesses, present all available evidence bearing upon the alien's liability to deportation, lodge such additional charges as he may find to be applicable, and, if the alien has applied for relief from deportation, inquire thoroughly into the alien's statutory eligibility for such relief. The hearing officer in such cases shall exercise all his regular functions not herein assigned to the examining officer, and he may, in addition, take such part in the interrogation of the alien and witnesses as he may deem necessary to assure that a full and proper hearing is held."

specific powers in connection with the hearing (8 C. F. R. (1951 Supp.) 151.2 (a)):

> *Conduct of hearing*—(a) *Hearing officer; general powers.* The officer assigned to conduct the hearing under a warrant of arrest shall be referred to as the "hearing officer". He shall have authority to (1) administer oaths and affirmations, (2) issue, during the course of the hearing, any subpenas authorized by law, (3) conduct the hearing and rule upon all objections to the introduction of evidence or motions made during the course of the hearing, (4) *take or cause depositions to be taken,* (5) make decisions in accordance with § 151.5, (6) grant voluntary departure or preexamination pursuant to § 150.3 of this chapter, or both, and (7) take any other action consistent with applicable provisions of law and regulation [emphasis added].

Since the language of Regulation 151.2 (a) was largely taken from Section 7 of the Administrative Procedure Act (5 U. S. C. 1006 (b)), as had been its counterpart in the regulations of March 1950, it is apparent that the exercise of the powers enumerated therein was intended to be governed by standards appropriate to the administrative process generally (as contrasted to court procedures). Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 141–144. This is also evidenced by the fact that, at the same time that the power was given the hearing officer to take or cause depositions to be taken, pro-

vision for the use of ex parte statements obtained during examination was not only continued in the regulations but was broadened in its scope.[15] Hearing officers were given broad latitude in both the kind of evidence they could admit and the evidence they could consider as having probative value, the only expressed restriction being that such evidence could not be "irrelevant, immaterial, or unduly repetitious" (8 C. F. R. (1951 Supp.) 151.2 (b)).[16] Since the hearing officer assumed an impartial status in the new procedural scheme, he was free within a reasonable area of discretion, not only to shape the procedures to meet the problems of the case, but to determine the best

[15] Under the caption "contents of record—evidence" it was provided (8 C. F. R. (1951 Supp.) 151.3):

"(b) *Use of statements made during course of investigation.* The hearing officer may enter of record any written or recorded statement or satisfactory evidence of any admission made by the alien or any other person during the investigation. If objection thereto is made by the alien or his counsel or representative, the reasons for the objection, as well as the ruling thereon by the hearing officer, shall be made a part of the record.

"(c) *Affidavit.* In cases in which an affidavit in narrative form has been made by an alien prior to the issuance of a warrant of arrest as provided in § 150.1 (c) of this chapter and such affidavit satisfactorily establishes the facts necessary for determination as to deportability, the hearing officer may enter the affidavit as an exhibit of record and it may be used as the basis for the decision in the case."

[16] This standard for the admissibility of evidence in deportation hearings was taken from Section 7 (c) of the Administrative Procedure Act (5 U. S. C. 1006 (c)). Cf. *Willapoint Oysters* v. *Ewing*, 174 F. 2d 676, 690–691 (C. A. 9), certiorari denied, 338 U. S. 860.

available method of proving a particular fact either by way of establishing or refuting the case against the alien. Cf. *Cella* v. *United States*, 208 F. 2d 783, 789 (C. A. 7), certiorari denied, 347 U. S. 1016.

If, for example, a witness whose statement had been taken during investigation was not to be found at the time of hearing, the hearing officer could, as before, admit the statement into evidence, subject to the infirmities that such statements have, especially those taken without opportunity for cross-examination. 8 C. F. R. (1951 Supp.) 151.3. If the witness was available and was present in the vicinity of the hearing, the hearing officer, could, of course, either invite him to attend or procure the issuance of a subpoena to compel his attendance to testify under Regulation 151.2 (a), *supra*.

In many cases, however, witnesses are far distant from the place of hearing, as in the instant case, and it is highly improbable that they would appear at the hearing by invitation. Whether or not such witnesses could reasonably be compelled to travel a great distance under the compulsion of subpoena, it is apparent that such procedure, almost inevitably necessitating resort to court enforcement and protracted litigation in the courts as to each witness (cf. *United States* v. *Vivian*, 224 F. 2d 53 (C. A. 7), certiorari denied January 23, 1956, No. 322, this Term), would extend the time involved in a deportation proceeding

far beyond its present limits. On the other hand, the impossibility of holding a separate hearing in each distant place where a government witness is present is equally apparent. To meet this situation, the hearing officer was specifically given authority under Regulation 151.2 (a) to have the deposition of a witness (either for the government or the alien) taken in lieu of other ~~from~~ some of proof.

While the power to take or cause depositions to be taken was delegated to hearing officers without specifying the precise steps to be followed where the witness was, as in the instant case, far removed from the place of hearing, and in another immigration district, the governing regulations were flexible enough to allow some reasonable latitude.[17] In practice, when it appeared

[17] The provisions contained in the 1950 regulations granting the power to hearing officers to take or cause depositions to be taken have been carried over into the 1952 regulations (8 C. F. R. (1952 rev.) 242.52), and in addition there is now the following provision specifically applicable to the situation involved in this case (8 C. F. R. (1952 rev.) 287.4):

"* * Upon determining that a witness whose evidence is desired either by the Service officer or the alien or other party affected will not appear and testify or produce documentary evidence unless commanded to do so and that the testimony and evidence of such witness is essential, the district director, officer in charge, or a special inquiry officer, in any proceeding pending before him, shall issue a subpena. If the witness is at a distance of more than 100 miles from the place of hearing, the subpena shall provide for the witness' appearance at the field office nearest to him to respond to oral or written interrogatories, unless the Service indicates that there is no objection to bringing the witness the distance required to enable him to testify in person at the hearing."

Compare Rule 26 (d) (3), F. R. Civil P.

that the testimony of a witness was required at the hearing, the hearing officer could apply through the Central Office of the Immigration and Naturalization Service for the issuance of an administrative subpoena, which was subsequently issued by the director of the particular district where the witness resided, requiring him to appear at the field office nearest to him to give testimony under oath administered by a hearing officer. If a witness failed or refused to obey such process, compliance could be secured by the Service through application for a court order to the United States district court in that jurisdiction. See 8 U. S. C. (1946 ed.) 152.

While such provision for depositions paralleled the existing practice in civil judicial proceedings, there was one significant difference. The hearing officer who presided at the deposition-taking was more than a mere notary. He could, through intervention in the questioning, protect the interests of the party against whom the deposition was being taken and could, where necessary, develop any issue which needed clarification or amplification to the end of securing a complete record of the testimony.

Implicit in the power given to take or to procure the taking of depositions was the right of the other party to have his counsel cross-examine the witness. *Bhagat Singh* v. *McGrath*, 104 F. 2d 122 (C. A. 9). As before, there was no provision in the regulations which granted the alien

any absolute right of confrontation of witnesses either where depositions were employed or otherwise, and no provision was made that the Service sustain the expense of transporting either the alien or his counsel to the place of the taking. Compare *Berkman* v. *Tillinghast, supra* (58 F. 2d 621); *Bhagat Singh* v. *McGrath, supra* (104 F. 2d 122); *Singh* v. *District Director, supra* (96 F. 2d 969); *Kishan Singh* v. *District Director, supra* (83 F. 2d 95); *Weinbrand* v. *Prentis,* 4 F. 2d 778 (C. A. 6).

This detailed review of the regulations shows that the use of deposition testimony has consistently been recognized as a proper method of proof in deportation hearings, as in other administrative and civil judicial proceedings. Inasmuch as the use of true ex parte statements, under special circumstances, has been held not to render deportation hearings unfair (see cases cited, *supra,* p. 55), it is evident that the use of formal deposition testimony, where there is full opportunity for the witness to be cross-examined by counsel, does not violate any general concepts of fairness.[18]

[18] The opportunity to cross-examine is tantamount to actual cross-examination (V Wigmore, *Evidence* (3d ed., 1940), Sec. 1371, pp. 51–53). It is well-established that a person can waive his right to be represented by failure or refusal to exercise it. *Moncado* v. *Ramsey,* 167 F. 2d 191 (C. A. 8); *United States ex rel. Karpathiou* v. *Schlotfeldt,* 106 F. 2d 928, 929 (C. A. 7); *Bhagat Singh* v. *McGrath,* 104 F. 2d 122 (C. A. 9); *Channan Singh* v. *Haff,* 103 F. 2d 303 (C. A. 9);

There may be instances where an order to take depositions in an administrative proceeding will produce individual hardship. Both the regulation here involved and Section 7 of the Administrative Procedure Act provide sufficient latitude to the presiding officer to take care of such special circumstances on a case-by-case basis. However, if a party to a proceeding feels that an order to take depositions would produce some extraordinary disadvantage to him, it is at least incumbent on him so to state so that the order may be modified by the hearing officer accordingly. No less is required in a civil proceeding (see *supra*, p. 50).

IV

NO CIRCUMSTANCES PECULIAR TO THIS CASE RENDERED THE USE OF DEPOSITION TESTIMONY A DENIAL OF DUE PROCESS

As shown in Point I, petitioner never in the course of the deportation hearing advanced any argument to show that the use of depositions

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Kishan Singh v. *Director*, 83 F. 2d 95 (C. A. 9), certiorari denied, 299 U. S. 561; *Berkman* v. *Tillinghast*, 58 F. 2d 621 (C. A. 1); *Ranieri* v. *Smith*, 49 F. 2d 537 (C. A. 7), certiorari denied, 284 U. S. 657; *United States* v. *Goldstein*, 271 Fed. 838, 845–846 (C. A. 8); *United States ex rel. Diamond* v. *Uhl*, 266 Fed. 34, 40 (C. A. 2). The principle of waiver is certainly no less applicable to the administrative than it is to the judicial process. Even an accused in a criminal proceeding may waive his constitutional right to be represented. *Johnson* v. *Zerbst*, 304 U. S. 458, 464.

Since petitioner had the *opportunity* to be represented but voluntarily waived it, he was accorded the protection to which he was entitled under the regulations.

would produce any special or unusual hardship in his case nor did he advance any reason to support his statement that it would be impractical to have counsel represent him in Honolulu. He rested on the broad contention that the Service was required as a matter of right to transport him and his Los Angeles counsel to Hawaii, and this despite the fact that petitioner, through the same counsel, had previously opposed the transfer of the hearings to Hawaii. In the judicial proceedings, however, and in particular before this Court, petitioner has cited several factors which he now contends rendered the use of deposition testimony unfair in this case.

He lays stress on the fact that the witnesses were unable to see him for identification purposes (Pet. Br. 98). While this fact might be highly relevant if there were a close and disputed question of identity, it has no special significance in this case since petitioner admitted his identity and there is not even a suggestion in the deposition transcript that the witnesses might have confused petitioner's passport picture (which petitioner himself identified at the hearing, R. 205–206) with anyone else's. The two witnesses whose testimony was credited with establishing the fact of past Communist Party membership expressed no doubt in identifying him as the person whom they had known as a party member and whose picture was shown to them. These witnesses covered not only the undisputed point

of identity, but gave definite testimony as to meetings, conversations, and other activities proving petitioner's active role of leadership in the Communist Party (*supra*, pp. 9–10). Petitioner not only failed to raise the issue of possible mistaken identity at the hearing, but he claimed the privilege against self-incrimination when asked to state his knowledge of the deponents. Whatever potential dangers may be involved in the use of depositions in a judicial or administrative proceeding where identity is really in issue, this is not such a case.

Petitioner also emphasizes the fact that all of the affirmative evidence as to his past membership in the Communist Party was developed through depositions without securing to him his asserted "right of presence". As we have already demonstrated, however, the depositions were taken with full opportunity given him to have the witnesses cross-examined, and otherwise in compliance with the governing regulations and administrative due process. They would thus constitute proper affirmative evidence at any judicial trial. And if the depositions were valid as evidence at all, they could be the basis for establishing the fact of past membership without more. The task of weighing and evaluating the evidence in a deportation proceeding is one for immigration officers whose determinations on questions of fact are made final by statute, and "[t]hey are free, within reason and fairness, to fol-

low their own views as to what has probative value on the issue presented". *Singh* v. *District Director,* 96 F. 2d 969, 971 (C. A. 9). And see *Vajtauer* v. *Commissioner,* 273 U. S. 103, 106. The final determination of the immigration officers is even less vulnerable to collateral attack where, as here, the alien has failed to present any rebuttal evidence whatsoever, and has not even denied the warrant charges.

Although he makes no special issue of it, petitioner stresses the fact that he was in the custody of the Service during the hearings in support of his argument that the Service should have "secured" his presence at the deposition-taking (Pet. Br. 97). This Court, however, in *Carlson* v. *Landon,* 342 U. S. 524 (to which this petitioner was a party), sustained the authority of the Service to hold him without administrative bail, and there can be no question that at all times he was being legally detained. His detention, therefore, has relevance to his argument only on the assumption that he had an absolute right to be present at the taking of the depositions, and was prevented from attending because of the refusal of the Service to allow him to be present. But such was not the case. As we have shown, he had no right of confrontation under the applicable laws, and he made no suggestion that he be given the opportunity to attend at his own expense. Since the examining officer stated on the record

that he would have been allowed to attend had he made any such request, it cannot be assumed that the Service did anything which could have prejudiced his case or would have created any improper obstacle to his going to Hawaii.

Petitioner did not before the Service and does not now point to any specific facts which rendered his presence necessary. As we have shown above, there was no issue of identity in this case. Not only could counsel have cross-examined the witnesses at the deposition proceedings, but petitioner was given additional time to seek cross-examination by interrogatories or direct questioning after he had opportunity to study the direct testimony. Under these circumstances, the hearing officer, to whom the regulations have delegated the function of conducting the hearing, did not act arbitrarily in ordering that the depositions be taken, and that is the real issue here.

Petitioner suggests that proof of the issues in deportation through deposition testimony should be forbidden where the testimony given is "within the area of the First Amendment" (Pet. Br. 108–109). However, the cases he cites in support of this proposition go to the issue of whether particular laws place unconstitutional restrictions on speech and assembly as a substantive matter. They do not impress any special procedural standards on the trial or hearing of such matters.

Finally, petitioner cites the hardships that will be entailed in his deportation both to himself and

his family (Pet. Br. 98–100). These considerations, however real, do not bear on the legal issues he presents, and are addressed to matters of congressional policy rather than judicial intervention on collateral attack. Cf. *Galvan* v. *Press,* 347 U. S. 522, 531. They do not establish the invalidity of standard modes of procedure in deportation. His further argument that he might be subject to persecution if deported to South Korea is an argument of the same category. It not only has no bearing on the issues presented, but is more properly addressed to the discretion of the Attorney General, which has been favorably exercised in this case.[19] See 8 U. S. C. 1253 (h).

Thus, not only did petitioner fail to point out to the hearing examiner any special circumstances which would render the use of depositions unfair in his case, but, even now, he has not been able to show any circumstances which militate against such use of the normal, long-established procedure for taking the testimony of distant witnesses. Petitioner's attack on the order of deportation must, on this record, rest on his broad assertion that he had an absolute right to confront the witnesses against him, as in a criminal trial. The whole course of judicial decision, throughout our history, refutes that contention.

[19] As petitioner acknowledges (Br. 19), he was granted a hearing on this question, and on November 18, 1954, his deportation to Korea was ordered indefinitely postponed.

CONCLUSION

The use of deposition testimony is a well established method of taking the testimony of distant witnesses in administrative and judicial proceedings. Petitioner made no attempt in the deportation hearing to establish and does not here show that this method of proof was unfair in the circumstances of this case. It is therefore respectfully submitted that the judgment of the court below should be affirmed.

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